

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION**

In re: Guidant Corp. Implantable  
Defibrillators Products Liability Litigation

MDL No. 1708  
(DWF/AKB)

This Document Relates to All Actions

**DEFENDANTS' RESPONSE TO  
PLAINTIFFS' STATEMENT  
CONCERNING DISPUTED  
AGENDA ITEMS FOR  
JANUARY 24, 2006 CASE STATUS  
CONFERENCE**

**Disputed Issues**

**1. Establishment of a Trial Plan.**

Plaintiffs assert that this Court should exercise its jurisdiction over defendants in such a manner so as “to ensure that the greatest number of Plaintiffs’ claims will be heard expeditiously and efficiently before this Court.” Plaintiffs’ Statement Concerning Disputed Agenda items for January 26, 2006 Case Status Conference at 1. Defendants respectfully submit that this Court’s goals in this multi-district litigation should not be driven exclusively by concerns of speed and efficiency, but also by notions of fundamental fairness and due process. Accordingly, defendants are prepared to discuss any “specific, concrete proposal” for the just and efficient management of this MDL that preserves the due process rights of all parties.

Plaintiffs put the cart before the horse. Plaintiffs propose setting priority trial dates without having resolved the preliminary procedural questions of what precisely is to be tried, how it is to be tried, and whom such judgments would bind. Instead, plaintiffs propose deferring what they characterize as “procedural” class certification

determinations in favor of an expedited trial on “injunctive, equitable, and declaratory relief” and concurrent bellwether trials of certain individual plaintiffs’ claims. Plaintiffs seem to be asking this Court to set a class trial without any class certification determination.

Defendants suggest in the alternative that this Court address key threshold procedural issues before scheduling trials. Before setting trial dates, this Court must first determine whether different plaintiffs’ claims are amendable to aggregate proof and, if so, how plaintiffs’ claims can be adjudicated on a classwide basis in a manner consistent with due process. This preliminary determination will dictate whether these cases will proceed on a class basis or an individual basis, or whether it is possible to extrapolate the results of “bellwether” trials to the claims of other plaintiffs. Defendants believe that this process will result in a determination that these claims cannot proceed on any basis but as individual trials.

This Court must also first approve a system by which the parties can efficiently but fairly adjudicate the threshold legal viability of different plaintiffs’ claims through dispositive motion practice. Defendants believe that few, if any, of plaintiffs’ claims will survive dispositive motions and proceed to trial.

Setting priority trial dates will not expedite discovery in this litigation, which is already proceeding at an amazing pace. To the contrary, the volume of documents sought by plaintiffs and produced by defendants to date demonstrates the scope and complexity of this litigation and the need to proceed at a deliberate pace. As defendants have explained in prior submissions (which defendants will not belabor here), plaintiffs’ proposed schedule of document production remains a physical and logistical

impossibility. Nonetheless, defendants remain committed to identifying and producing documents responsive to plaintiffs' priority requests as quickly as reasonably possible.

**2. Discovery Matters.**

Defendants would welcome any guidance this Court is able to provide on discovery issues, but frankly doubt whether Court supervision of weekly telephonic discovery conferences would be an efficient use of this Court's time. Defense counsel has repeatedly made itself available to meet and confer with plaintiffs' counsel on discovery issues, not only through the weekly-scheduled telephonic conferences, but have also agreed to several ad hoc discovery conferences requested and repeatedly rescheduled by plaintiffs' counsel.

Regardless of whether this Court is able to supervise the weekly telephonic discovery conferences, defense counsel remain committed to attempting to resolve potential discovery disputes through the meet and confer process. As set forth in Timothy A. Pratt's January 10, 2006 letter to this Court regarding outstanding discovery issues, the parties have succeeded in resolving many potential discovery disputes through the meet and confer process.

Contrary to Ms. Cabraser's characterization, discovery in this litigation has not proceeded in "fits and starts." Plaintiffs' Statement Concerning Disputed Agenda items for January 26, 2006 Case Status Conference at 2. Defendants have worked and will continue to work constantly to respond to plaintiffs' discovery requests. Defendants have to date produced more than two million pages of responsive documents through periodic large productions rather than a daily flow of documents only in order to more efficiently group, track, and package productions of related documents. If plaintiffs have

a preferable method of production they would like to suggest, defendants are willing to consider it.

Although Ms. Cabraser discounts the value of the more than two million documents produced to plaintiffs to date, the parties have prioritized the production of work project files because these documents contain the design and product development information for the devices at issue in this litigation. While Ms. Cabraser claims that the work project files produced by defendants are difficult to read due to technical issues, defendants have provided plaintiffs with explanatory information and have placed plaintiffs' technical representatives in contact with defendants' technical representatives and are currently working together to resolve any outstanding technical issues. Defendants recognize, however, that this is complex litigation involving technical, complex product design issues.

Defendants anticipate being able to produce within a few days another substantial set of responsive prioritized documents. Now that plaintiffs have last week prioritized thirteen of their document requests, defendants will, as they have represented to plaintiffs' counsel, immediately prioritize and identify and produce responsive documents as soon as possible.

### **3. Schedule for Class Certification/Master Complaint(s).**

Defendants' position regarding the advantages of requiring plaintiffs to file a Master Complaint, and the scheduling of class certification matters is fully set forth at sections II(D) and III of Defendants' Points and Authorities Regarding Disputed Issues in Joint Proposed Pretrial Order No. 1. Simply put, if plaintiffs are in no position to be

able to file a master complaint without additional discovery, defendants have difficulty envisioning how plaintiffs propose to schedule immediate trial dates.

Defendants submit that the filing of a Master Complaint and prioritized class certification procedures would resolve threshold issues, frame the issues in these cases, focus discovery and motion practice, and facilitate the efficient and fair prosecution of this MDL. Defendants have grave doubts regarding plaintiffs' proposal that the parties first try the case in order to focus the issues in this litigation, and then address procedural issues after the fact. Defendants respectfully submit that this Court should develop a sequenced trial management plan, beginning with pretrial pleading and discovery, continuing with dispositive motion practice, next addressing the question of class certification, then developing trial plans as necessary, and then culminating in the setting of trial dates as necessary and appropriate.

Respectfully submitted,

SHOOK, HARDY & BACON, LLP

By: /s/ Timothy A. Pratt  
Timothy A. Pratt, MO #26729  
2555 Grand Blvd.  
Kansas City, Missouri 64108-2613  
Telephone: 816.474.6550  
Facsimile 816.421.5547

Joseph M. Price, MN#88201  
FAEGRE & BENSON L.L.P.  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-3901  
Telephone: 612.766.7000  
Facsimile: 612.766.1600

Attorneys for Defendants